SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 298

PEYTON PACKING COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction and Summary Statement, see pages 8 and 2 of the Petition for Writ of Certiorari herein which are adopted by reference thereto.

Specification of Errors.

The United States Circuit Court of Appeals for the Fifth Circuit erred:

I.

In failing to sustain the proposition that the evidence conclusively showing that Gregorio Alarcon and eight others were each discharged by the Peyton Packing Company because of its reasonable belief that they had wilfully violated its rule against solicitation on company prop-

erty or time, knowing that penalty for its breach was discharge, and the evidence further showing that each of said employees did in fact deliberately violate said rule, the company was within its rights and the discharges were proper.

II.

In considering as unfavorable evidence against the Peyton Packing Company, with respect to whether it had violated the National Labor Relations Act, the fact that an official of the company had declined to confer with an individual who claimed to represent a majority of the company's employees, where that individual never at any time produced any proof that he did represent any of such employees.

III.

In disregarding reasonable, relevant and wholly undisputed evidence favorable to the Peyton Packing Company that its only reason for discharging the employees in question was their violation of a long-posted rule of the company, and resting its decision of discriminatory discharge solely on circumstantial evidence consisting of inferences drawn from the company's refusal to confer with a labor organizer who offered no proof of authority to represent any employee, together with inferences drawn from isolated and unauthorized remarks by minor employees contrary to the company's publicly announced policy.

In failing to sustain the proposition that the evidence discloses no lawful basis for the board's findings and conclusions that the company had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of The National Labor Relations Act.

Summary of Argument.

POINT A.—The action of the board in this case in ordering reinstatement of discharged employees is an unwarranted interference with the company's right to conduct its affairs in an orderly manner.

POINT B.—The company had a lawful right to refuse to confer with a labor organizer, who pretended to represent a majority of its employees but failed to produce any proof of such claim after written suggestion by the company that he do so, and it cannot be charged with unlawful intent by the exercise of such lawful right.

POINT C.—It was highly prejudicial to the company for the board and Circuit Court of Appeals to brush aside all substantial and undisputed evidence in its favor and decide the case against it on inferences drawn from isolated circumstances in themselves insufficient to overcome the undisputed evidence.

POINT D.—Aside from the matter of the discharges for violation of the company rule, which it is contended were proper, there is no legitimate evidence in the record from which the company's coercion of its employees as regards their rights under the Act may be inferred.

Argument.

POINT A.—(Unwarranted interference.) In its first consideration of the constitutionality of the Act, this Court said in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp'n*, 301 U. S. 1, 46, that

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them, and the Board may not make its authority a pretext for interference with the right of discharge.

In conformity therewith, Circuit Courts of Appeals have been upholding an employer's right to enforce reasonable rules by discharge as the penalty for violation.

The precise rule now involved first came before such a court for consideration in *Midland Steel Products Company* v. *National Labor Relations Board,* 113 F. (2d) 800, by the Sixth Circuit Court, wherein it was said:

> "The employer has the right on his premises to demand the single-minded attention of the employee to his work. In modern industry the performance of work with efficiency and without physical danger depends not only upon the devotion of the employees to their work, but also upon the amity with which they cooperate.
>
> "The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets in tense discussion before work has been commenced or in the noon hour, may reasonably be expected to carry a certain animus over to work hours. If the rule against solicitation is reasonable, the fact that it is applied to solicitation for union membership does not relieve the employee of his obligation of obedience. Cheek was at liberty to solicit the employees outside of the plant. Inside the plant, in order to secure efficiency, harmony and safety, prior to this controversy, the employer had prohibited solicitation of any kind. The rule was reasonable, as it was calculated to secure concentration of the employees on their work and thus protect the safety of the employees. It was deliberately violated and hence Cheek's discharge was not unlawful." 113 F. (2d) 800, 805, par. 11-14.

In *National Labor Relations Board* v. *William Davies Company,* 135 F. (2d) 179, C. C. A. 7, the rule forbade solicitation on company property or time. The Seventh Circuit Court held that even if the rule were too broad as

applied to solicitation on company property while the employee was on his own time, this would not prevent its application to the case where the employee engaged in such solicitation during working hours.

In the instant case all violations were actually during work hours on company time and there were present not only the elements considered by the Sixth Circuit Court of Appeals to be adequate for its holding in that case, but also the additional and all-compelling reason for the action taken by the Peyton Packing Company, in that if it had not stopped solicitation by the A. F. of L. union when the fact of its existence was urged upon its attention, it would undoubtedly have been charged again by the C. I. O. union before the board with an unfair labor practice, for it had been found by the board in 1940 to have violated the Act by tolerating solicitation, on its premises during work hours, for membership in an employees' association and thereby was said to have been unfair to the C. I. O. union. Under these circumstances it would have been without any defense to such new charges by the C. I. O.

Bear in mind that the rule had been posted in January by the company, on the advice of its attorney, as a means of preventing a recurrence of conditions at the plant which had led to the first charge by the C. I. O. union, and further that the discharges in May for the violations of the rule were also effected upon that attorney's advice that such procedure was the only proper one left open.

Yet the board found that the company had no right to promulgate and enforce such a rule (R. 88), and it is submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit in affirming the order of the board and holding such discharges to be discriminatory is in conflict with the cases to which reference has been made above.

POINT B.—(Improper holding regarding evidence.) Allen Williams, the labor organizer, wrote to J. C. Peyton of the Peyton Packing Company, on May 19, 1942, a letter stating that his union had been designated by a majority of the company's employees to represent them as their collective bargaining agent, and requested an interview (Board Exhibit 2, P. P. Co. Appdx. 181-182).

To this Peyton replied by letter dated May 21, 1942, wherein it was called to Williams' attention that he had furnished the company with no proof of his claim, and advised him that whenever the company was "furnished with proof that such is the desire of the majority, you may rest assured that we will properly meet that situation when and if it arises" (Board Exhibit 3, Board Appdx. 140, in evidence Board's Appdx. 3-4).

The board seized upon this letter of Peyton's as an excuse upon which to find that "Thus faced with the necessity of recognizing the Union and bargaining with it, a duty which the respondent was unquestionably unwilling to fulfill, the respondent was carrying out its threat to 'meet that situation when and if it arises,' by discharging union members in order to destroy the Union's majority" (R. 91), and the Circuit Court of Appeals recites this letter of Peyton's in its opinion as an element contributing to its finding of discrimination on the part of the company (S. R. 136).

Now, in the first place, seven of the nine men involved had already been discharged before May 19, the date of Williams' contact with Peyton (Diaz, May 15,—Board's Appdx. 26; Ochotorena, May 15,—Board's Appdx. 52; Mena, May 15,—Board's Appdx. 46; Renteria, May 18,—Board's Appdx. 22; Lopez, May 18,—Board's Appdx. 5; Barreda, May 18,—Board's Appdx. 28; Arciniaga, May 18,—Board's Appdx. 33), and the investigation had already begun as to all of them, but regardless of the fact that Williams' com-

munication with Peyton came at such a time that it could not have contributed to the initiation of the investigation of the activities of these men as regards their violation of the rule, the fact remains that there had been no election among the company's employees to determine whether any union should be chosen as their representative for purposes of collective bargaining. (Record discloses no election.)

The Act, 29 U. S. Code, par. 150, et seq., imposes on employers the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. (Cf. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 548, with references to the Railway Labor Act.)

It has, therefore, been held by the Sixth and Eighth Circuit Courts of Appeals that a company's refusal to recognize or confer with an alleged representative who produced no proof that he in fact represented a majority of its employees is not an unfair labor practice.

Texarkana Bus Co. v. *National Labor Relations Board,* 119 F. (2d) 480, par. 6-10, C. C. A. 8;

National Labor Relations Board v. *Empire Furniture Company,* 107 F. (2d) 92, par. 3, C. C. A. 6;

North Electric Mfg. Co. v. *National Labor Relations Board,* 123 F. (2d) 887, par. 5-6, C. C. A. 6.

In the *Texarkana Bus Co.* case, *supra,* it is held that such refusal on the part of the company does not warrant an unfavorable inference against it with respect to whether it had violated the Act, even where the alleged representative really did have the authority, which is in direct conflict with the holding of the court below.

Point C.—(Disregard of undisputed evidence.) As pointed out in the "Summary Statement of Matter Involved" at the beginning of the Petition for Writ of Cer-

tiorari, to which reference is here made, the company's president, L. F. Miles, swore positively at the hearing before the board's trial examiner that the company's only reason for the discharge of the particular men under discussion was their violation of the rule against solicitation.

As further pointed out therein, it was absolutely undisputed that prior to the present charges the company had been held by the board to have violated the Act by toleration of solicitation of membership in an employees' association in competition with the C. I. O.; that thereafter the company was advised by its attorney to post a "no solicitation" rule as a means of preventing a recurrence of circumstances leading to the first charges by the C. I. O.; that all employees affected herein knew of and understood said rule; that the company, in efforts to avoid a repetition of its former difficulties, possibly even before the notice against solicitation was posted, forbade members attempting to form a new independent association from soliciting membership on company property, and after the rule was posted had extended it by enforcing it against political candidates, insurance salesmen, and representatives of charitable organizations; that more than three months after the rule was posted complaint was made by a member of the employees' association that solicitation for membership in some Union other than his own was taking place all over the plant; that violators of the rule were discharged by the company on advice of its attorney that failure to do so would result in charges again being filed against it by the C. I. O. or some union other than the A. F. of L. union; and that notices of impartiality had been posted in writing by the management which had in addition issued to its supervisory employees orders for the maintenance of strict neutrality.

What further precautions could this company possibly have undertaken?

We respectfully submit that those undisputed facts conclusively support Miles' testimony that the only reason for the discharges was the violation of the rule, but the board and the Circuit Court below simply disregarded them in their entirety. In so doing we believe and here allege that said court has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

For instance, in *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153, 177, it is said by the Ninth Circuit Court of Appeals:

"It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act * * * which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence."

The same holding under the Act was also made by the Sixth Circuit in *National Labor Relations Board* v. *Thompson Products*, 97 F. (2d) 13, 15.

There is nothing in the Act itself indicative of Congressional intent that the board or a court in cases arising under that law should discard evidence favorable to an employer and consider only that favorable to an employee. In fact this Honorable Court has itself recently said:

"Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

National Labor Relations Board v. *Indiana & Michigan Electric Company*, 318 U. S. 9, 28.

Consequently decisions of this Court in cases not arising under the Act are applicable, and it has been held that undisputed evidence even though coming from an interested witness may not be disregarded arbitrarily:

Pennsylvania Railroad Company v. *Chamberlain,* 288 U. S. 333.

Chesapeake & Ohio Railway Company v. *Martin,* 283 U. S. 209, 214.

In the present case, overwhelming evidence in favor of the employer was heard, considered and weighed by the trial examiner who found in favor of the employer on every point, but when the board itself, and later the Circuit Court of Appeals, got around to the matter the evidence was still in the record, but it just as well might not have been for it was wholly brushed aside, by reason of which, it is submitted that the decision of the court below is in conflict with all of the authorities to which reference is made above under this point.

Point D.—(No substantial evidence.) If the Peyton Packing Company had no lawful right to make and enforce its rule against solicitation, then there was evidence of coercion. But, we have endeavored to demonstate that it did have such right, and believe ourselves to be correct in this position. If so, there is no substantial evidence in the record to support the board's finding of coercion affirmed by the court below.

This Honorable Court has held that under Section 10(e) of the Act "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' "

National Labor Relations Board v. *Columbian Enameling & Stamping Company*, 306 U. S. 292, 300.
Consolidated Edison Company v. *National Labor Relations Board*, 305 U. S. 197, 229.

Tested by such rule the board's findings are without support. They are sought to be upheld by the following circumstances:

1. One Raul Aguilar made disrespectful statements concerning the union. He did, but he was not in any sense of the word a foreman or even a supervisory employee, had no authority to hire or discharge anybody and no right to make or custom of making recommendations in this respect. He was just a billing clerk like other ordinary employees (P. P. Co. Appdx. 132) and under his constitutional right of free speech was at liberty to express whatever opinions of the union he had, whether good or bad. There is absolutely no evidence that any company official with authority to take corrective action ever knew of any of the uncomplimentary remarks which he had made until the trial of this case, and most assuredly they were not authorized.

2. Foreman Higdon is said to have stated to Juan Araujo: "Johnny, they want to see you down in Mr. Peyton's office," and turning to leave said: "We are going to get you guys in the union one by one, especially you boys with the mustaches" (Board Appdx. 56).

In the first place Higdon was not Araujo's foreman at all. There can be no dispute about that. He was foreman of the sausage department (P. P. Co. Appdx. 113), while Araujo worked in the pork shipping department (Board Appdx. 55), and his foreman was Nick Gonzales (P. P. Co. Appdx. 33).

In the second place the remark, if made, (and it was denied) was obviously made in a spirit of banter and jest.

Finally, Araujo was never discharged, but on the contrary was to have been made foreman of a new department but for the fact that his own foreman objected to this on the ground that taking Araujo away from him would disrupt his organization (P. P. Appdx. 33-35).

3. Jack Lee was said to have asked Francisco Ledezma, (at a time indefinitely identified as "not more than six months" before the hearing, which began on November 5, 1942), whether he belonged to the union, and whether he knew if others belonged to it (Board Appdx. 45).

At the time this question is supposed to have been asked Jack Lee was not an assistant foreman or even a supervisory employee of any sort. He was merely a cowboy in the feed lots like the rest of them (P. P. Co. Appdx. 117). He was eligible to membership in the union, and could have asked the question with an idea of joining. In any event the law does not forbid the mention of a union in casual conversation:

> Foote Bros. Gear & Machine Corp'n. *v.* National Labor Relations Board 114 F. (2d) 611 par. 4-5, C. C. A. 7— (reversed on improper record 311 U. S. 620, and same holding made again by Circuit Court of Appeals 121 F. (2d) 802).

Furthermore, Ledezma was never discharged, nor was he in any way treated in any manner objectionable to him.

4. Florez, a foreman on the killing floor, was claimed to have been overheard by Roberto Yudico "somewhere close to June" saying that "the union is going to hell right here," and that he was going to get rid of each one of them slowly (Board Appdx. 44).

There is absolutely no evidence or suggestion as to what circumstances led up to the remark, if made, and nothing to show to whom it was supposed to have been addressed, or whether made in serious discourse or as a joke.

None of the discharges of which complaint is made took place in June; there is no evidence that more than one union man was ever discharged for any cause at any time from the department in which Florez was foreman, and it affirmatively appears that Roberto Yudico was never discharged (P. P. Co. Appdx. 22).

5. It was claimed that Gandara had stated to Araujo "I knew all about you, because I got men in that union who go to the meetings and come to me and tell me everything that goes on in those meetings" (Board Appdx. 59). This obviously is the basis of the court's statement that supervisory employees "Spied upon the union's affairs" (S. R. 136).

Consequently the board and the court below not only have chosen to believe Araujo as against Gandara (which they may do under the law), but have gone further and inferred that what Araujo said that Gandara said was true, and further have inferred from this that Gandara reported to the company information which he is inferred to have received by the method which he is inferred to have used, and still further have inferred that the company used, to the detriment of the union, the information which they infer was given to it. Thus the board and the court below have sought to bolster their decision by an inference upon an inference upon an inference, which just isn't permissible:

National Labor Relations Board v. *Pick Mfg. Co.*, 135 F. (2d) 329 par. 7, C. C. A. 7;

Interlake Iron Corp'n. v. *National Labor Relations Board*, 131 F. (2d) 129 par. 4, C. C. A. 7.

6. It is claimed as a matter of evidence against the company that the rule was administered during the union's formative period.

In the first place this is like claiming that the death of a man who died during an eclipse of the moon was caused by the eclipse.

In the second place it is undisputed that the union organizer Allen Williams did not come to El Paso until February 10 or 11, 1942 (Board Appdx. 1), whereas the rule against solicitation had been posted since January 26, 1942 (P. P. Co. Appdx. 61).

In the third place the company had already forbidden solicitation by Muro's independent union (P. P. Co. Appdx. 126, 130, 138 and 165).

And finally it ought to be obvious that the very time at which an employer should post such a rule in an effort to maintain strict neutrality would be at such time when solicitations were apt to be undertaken by rival organizations.

7. J. F. Gandara is alleged to have said to Eugeno Lopez that those "who are going to join the union are going to get fired, and it is going to be too bad for them" and asked him to turn in the names of "any of the boys who belong to the union" (Board Appdx. 9).

Gandara was not a foreman. He had no authority to employ or discharge anybody, but on the other hand was subject to orders of every official of the company (P. P. Co. Appdx. 146-147). He had been issued orders of strict neutrality in labor matters, and consequently disobeyed positive instructions if he made the statements attributed to him (P. P. Co. Appdx. 151, 92, 95-96, 120, 173 and 175).

A servant cannot place tort responsibility on a master unless he is acting within the scope of his authority and in the furtherance of his master's business, and an agent with-

out authority cannot bind his principal in contract. And so, under the National Labor Relations Act, an employer is not to be held liable for sporadic anti-union statements when made by even supervisory employees:

National Labor Relations Board v. *Sands Manufacturing Co.*, 306 U. S. 332, 341-342;

Wilson & Co. v. *National Labor Relations Board*, 120 F. (2d) 913, 920, par. 6, C. C. A. 7;

Martel Mills v. *National Labor Relations Board*, 114 F. (2d) 624, par. 11, C. C. A. 4;

National Labor Relations Board v. *Empire Furniture Co.*, 107 F. (2d) 92, par. 2, C. C. A. 6;

Kansas City Power & Light Company v. *National Labor Relations Board*, 11 F. (2d) 340, par. 8, C. C. A. 8;

Ballston-Stillwater Knitting Co. v. *National Labor Relations Board*, 98 F. (2d) 758, 762, C. C. A. 2;

National Labor Relations Board v. *Swank Products*, 108 F. (2d) par. 2-3, C. C. A. 3.

The company had publicly announced its policy both in writing (P. P. Co. Appdx. 204) and orally (as above indicated) and it had no knowledge of Gandara's statements, if he made them, until the board's witnesses at the trial said he did. Under the circumstances the company had done all that reasonable requirements could possibly dictate to avoid any further entanglement with charges of unfair labor practices.

Be it remembered that all of the statements in disrespect of or prejudicial to the union were denied by those employees charged by the board with having made them, and the trial examiner who saw and observed the witnesses believed those denials. In this connection attention is invited to the fact that Eugeno Lopez, praised by the board as a "forthright, intelligent, and trustworthy witness" (R. 75), was a matter of fact a self-confessed liar (P. P. Co.

Appdx. 6-7). Realizing, however, that under the Act the board is at liberty to rest its decision on the testimony of liars if it feels so disposed, we have not burdened this brief with citations to the record wherein all of remarks unfavorable to the union were denied, but have accepted them for purposes of this argument as having been made in fact.

Nevertheless, even if made as alleged, they create no more than a suspicion against this employer, and under the holdings of this Court and of other Circuit Courts, that is not enough to overcome the undisputed evidence in support of President Miles' direct testimony concerning the reason for the discharge of these employees. Under the circumstances the management of the company had done all that reasonable requirements could possibly dictate.

Conclusion.

We, therefore, submit that the petitioner was not guilty of any unfair labor practice; that the United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the order of the National Labor Relations Board; and that petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

PEYTON PACKING COMPANY, INC.,
Petitioner.

By EUGENE T. EDWARDS,
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